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JAMES R. BROWNING

No. 638

In the Supreme Court of the United States

OCTOBER TERM, 1960

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 475, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The original opinion of the court of appeals and its opinion on rehearing (Pet. App. 1–8) are reported at 281 F. 2d 593. The decision and order of the National Labor Relations Board (R. 114–118)[1] are reported at 124 NLRB 696.

[1] "R." references are to portions of the Transcript of Record printed pursuant to the rules of the court below as Volume I. "B.A." references are to portions of the testimony and exhibits printed as an appendix to the Board's brief below.

JURISDICTION

The decision of the court of appeals was entered on August 18, 1960 (Pet. App. 1; p. 15). A petition for rehearing, filed by the Board, was granted in part on October 13, 1960 (Pet. App. 7). The petition for a writ of certiorari was filed on January 9, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence on the record considered as a whole supports the Board's conclusion that the Union's picketing at construction projects, at which both employees of the primary employer and those of neutral employers were working, was intended to induce work stoppages by the latter, in violation of Section 8(b)(4)(A) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provision of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), is set forth at p. 4 of the petition.

STATEMENT

A. *The Board's Findings of Fact.*[2]—Macatee, Incorporated, is a dealer in wholesale and retail building materials and supplies, and a contractor in the building and construction industry (R. 35). The building materials division is carried on by truckdrivers, helpers, glass cutters, warehousemen, shipping and receiving clerks, and machinists or

[2] The underlying facts upon which the Board's findings rest were stipulated to by the parties below (R. 35; B.A. 1–26).

mechanics, all of whom work in or out of the Company's warehouse and office, and are represented by petitioner Union pursuant to a Board certification (R. 35). The construction division employs approximately 81 building tradesmen such as carpenters, roofers, sheetmetal workers, and laborers, none of whom is included in the certified bargaining unit (R. 36).

Prior to the events in this case, the construction division employees reported to the Company's office on an average of three times per week to receive new job assignments, or to pick up materials and equipment or weekly paychecks (R. 36). In this group of employees were approximately 25 in the deck department and 20 in the roofing department who ordinarily reported daily at Macatee's premises (R. 37).

On May 12, 1958, petitioner Union caused a strike of the employees in the building materials division in support of contract demands. At the outset of the strike, picketing was limited to the Company's premises where its plant, office, and warehouse were located (R. 38). However, the Company changed the requirement that the construction division employees report regularly to the Company's office. Some of these employees began reporting at a vacant lot across the street from the Company's office, and others went directly from their homes to their job sites or reported at other locations removed from the Company's premises (R. 39).

In July 1958, the Union undertook to reach the latter group of employees by picketing at the construction projects where they were working during the

time they were on the job (R. 49). Prior to this picketing, the Union wrote letters to contractors in the Dallas area informing them of the strike, and requesting that they "make no purchases from or do any business with Macatee, Inc., until this labor dispute is settled" (R. 46). The letters also requested permission to picket directly on any work site where the Company's employees were on the job, and added that, if no reply were received, the Union would assume that the request had been denied and would picket "the entrances of your job wher Macatee's employees are working" (R. 47, 48). None of the contractors granted the Union permission to picket on the job site, and the Union's picketing was accordingly carried on at the entrances to the projects (R. 49).[3]

About August 12, 1958, the Company issued new orders respecting the reporting practices of its construction employees. All such employees were told to report each morning before work to the vacant lot across the street from the Company's office (R. 39).

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[3] The Company filed an unfair labor practice charge based on the July picketing, alleging a violation of Section 8(b)(4)(A) of the Act, but it was dismissed following investigation by the Regional Director (R. 51). The dismissal was sustained on appeal to the General Counsel on the ground that the picketing "was primary rather than secondary activity" (B.A. 42). The General Counsel's ruling noted that the picketing was carried on at a time when the Company "required the construction employees to report at various temporary assembly locations all of which were considerably removed from the plant," with the result that such employees could not effectively be reached by the picketing at the Company's premises, and that the picketing at the construction sites was directed solely at the Company's construction employees (B.A. 41).

With but few exceptions, all the employees complied with the reporting instructions and thus daily saw the pickets at the Company's premises, and the signs that they carried (R. 40). The carpenters and carpenter helpers, however, were reluctant to report to work at the site of the picketing, and arranged with the Company to report at a point approximately 75 feet north of the Macatee property (R. 41). Similarly, the employees in the roofing and deck departments refused to cross the picket line and assembled in the street (R. 36, 42). But both groups still remained within full view of the pickets.

In January and early February 1959, the Company and the Dallas County Construction Employers' Association, Inc., corresponded with the Union for the purpose of making clear that all construction employees were required to report daily at or near the Company's office and within sight of the picketing of the Company's premises (R. 52–55, 57–59). In addition, the letters expressed the view that any recurrence of the picketing at the construction projects, in these circumstances, would be unlawful, and requested that no such picketing be undertaken (R. 57–59).

In late February 1959, however, the Union reinstituted its picketing activities at construction projects where employees of the Company were working (R. 60). On each of these occasions the picketing was conducted on public property adjacent to the job site, and the legends on the signs read (R. 59):

MACATEE BUILDING MATERIALS ON STRIKE

> We are only picketing Macatee and its employees working on this job site. We are not picketing any other Company or employees of any other company.
>
> DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS OF AMERICA—LOCAL 745

In most instances, the picketing caused the employees of neutral contractors who were working on the projects to stop work. Moreover, at the Richardson school job, the picketing continued for at least two hours after the Macatee employees had left the job. And, at the John Deere project, the picketing was not confined to the area where the Macatee employees were working but covered the entire property, including an entrance rarely used by Macatee, and, as a result of the picketing, employees of seven different trucking companies refused to pick up and make deliveries at the project (R. 60–63).

During the course of the above-described picketing, the Union also extended the picketing at the Company's premises. On March 27, 1959, the Union picketed the vacant lot across from the Company's office, where a number of the construction division employees reported (R. 41). During succeeding days, the pickets also appeared at other locations near the Company's premises where other employees, particularly the carpenters, had been assembling, and, as the assembly points were relocated on and nearby the Company's premises, the Union readjusted the picketing to cover such places (R. 42–45).

B. *The Board's Conclusions and Order.*—The Board found that the Union violated Section 8(b)(4)(A) by its picketing activities on and after February 24, 1959, at the various construction projects on which the Company's construction division employees were working. In finding that such picketing was intended, at least in part, to induce employees of other contractors to engage in work stoppages, contrary to Section 8(b)(4)(A), the Board relied upon the following circumstances: (1) the Union had adequate opportunity to reach the Company's employees by its picketing activities at the Company's premises, where all employees were required to report daily; (2) the Union's letters to contractors in the Dallas area stated that the Union desired the contractors to cease doing business with the Company; (3) employees of other contractors on the job sites frequently stopped work in response to the picketing; and (4) the manner of picketing at some of the construction projects was not consistent with a purpose to restrict the appeal to the Company's employees (Pet. App. 14–16; R. 114–116). The Union was ordered to cease and desist from the unfair labor practices found and to post appropriate notices (Pet. App. 17–18; R. 117–118).

C. *The Decision of the Court of Appeals.*—The court of appeals, except for modifications not material here,[4] enforced the Board's order (Pet. App. 1–6).

[4] On the Board's petition for rehearing, the court amended in part its original modification of the Board's order (Pet. App. 7–8).

The court held that substantial evidence supported the Board's finding that the Union intended, by its picketing at the construction projects, to induce work stoppages by employees of contractors other than the Company, in violation of Section 8(b)(4)(A).

ARGUMENT

1. The decision of the court was issued on August 18, 1960, and a judgment was entered the same day (see the Appendix, *infra*, p. 15). The petition for certiorari was not filed until January 9, 1961, which is more than 90 days after the judgment. Although a petition for rehearing was filed by the Board and granted in part on October 13, 1960 (Pet. App. 7), this merely related to the breadth of the order and did not affect the underlying unfair labor practice findings. Thus, it would not extend petitioner's time for certiorari. Nor would its time be extended by the fact that the court issued a decree on November 14, 1960 (Pet. App. 9), for the decree did not change any matter of substance or resolve any ambiguity in the judgment of August 18. Accordingly, under *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, the petition is untimely.

2. The substantive issue here is whether there was sufficient evidence to support the Board's finding that on and after February 24, 1959, the Union's picketing at the construction projects where the employees of the primary employer, Macatee, worked together with those of neutral contractors—was aimed not only at Macatee but was directed likewise at the neutrals and their employees. While all picketing at a common situs has to some extent the purpose of influencing employees of neutral employers to leave their jobs, the

Board and the courts of appeals have firmly established the rule that if the picketing is confined as nearly as practicable to the primary employer, the picketing is legitimate primary activity; if it is unnecessarily directed at neutral employers, it is secondary and proscribed by Section 8(b)(4)(A). The court below, after examining the circumstances surrounding the picketing, concluded that there was sufficient basis to warrant the conclusion that the Union's object was a secondary one. The resolution of this particular factual question adversely to petitioner does not present an issue appropriate for review by this Court. See *Universal Camera Corp* v. *National Labor Relations Board*, 340 U.S. 474, 491.[5]

In any event, the record supports the conclusion reached below. When petitioner reinstituted the construction site picketing in February 1959, Macatee's construction employees were reporting for work daily in the vicinity of the primary picket line at Macatee's premises. Accordingly, it was not necessary to extend the picketing to the construction projects to bring the labor dispute to the attention of Macatee's construction employees. Moreover, prior to such extension, the Union had indicated a secondary object by its letter to the contractors urging them to cease

[5] Neither the 1959 amendments to the Act nor *Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *National Labor Relations Board*, No. 321, this Term, certiorari granted, 364 U.S. 869, have any bearing on this case. The question presented in *Local 761* is whether the premises of the primary employer may be treated as a common situs when independent contractors and their employees work on the premises in a regular and continuous manner. The instant case is concededly a common-situs picketing situation and the only question is whether there is sufficient evidence in support of the Board's finding of unlawful purpose.

doing business with Macafee. And, in picketing at the construction projects, the Unión confirmed that its target was the neutral contractors as well as Macatee, for it picketed at times and places when only the contractors' employees were likely to be affected by the picketing, and made no attempt to explain to those employees, when they stopped work as a result of the picketing, that it was not aimed at their employers. These circumstances give support to the inference drawn by the Board, and affirmed by the court below, that the picketing had a secondary object. See *Truck Drivers Local 728* v. *National Labor Relations Board*, 249 F. 2d 512 (C.A. D.C.), certiorari denied, 355 U.S. 958; *General Truck Drivers, Local 270* v. *National Labor Relations Board*, 252 F. 2d 619 (C.A. D.C.), certiorari denied, 356 U.S. 931, enforcing 117 NLRB 885; *Amarillo General Drivers, Local 577* v. *National Labor Relations Board*, 273 F. 2d 519 (C.A. D.C.), enforcing 122 NLRB 1275; *National Labor Relations Board* v. *United Steelworkers, Local 5246*, 250 F. 2d 184 (C.A. 1); *National Labor Relations Board* v. *General Drivers, Local 984*, 251 F. 2d 494 (C.A. 6); *National Labor Relations Board* v. *Truck Drivers, Local 728*, 228 F. 2d 791 (C.A. 5); *Superior Derrick Corp.* v. *National Labor Relations Board*, 273 F. 2d 891 (C.A. 5), certiorari denied, 364 U.S. 816; *National Labor Relations Board* v. *Local 294, Teamsters* (C.A. 2), No. 26, decided November 10, 1960, 47 LRRM 2085.

Contrary to petitioner's contention (Pet. 13), the Board and court of appeals did not rest their decisions on the premise that picketing at a situs removed from the permanent place of business of the

primary employer is automatically for the unlawful object of inducing secondary action. The court below long ago disapproved of such an automatic rule. *National Labor Relations Board* v. *General Drivers, Local 968*, 225 F. 2d 205 (C.A. 5), certiorari denied, 350 U.S. 914. However, it and other courts have recognized that the availability of another place to picket the primary employer is nevertheless a relevant factor to be considered along with others in determining whether there is a secondary object. Cf. *National Labor Relations Board* v. *General Drivers, Local 968, supra*, with *National Labor Relations Board* v. *Truck Drivers, Local 728*, 228 F. 2d 791 (C.A. 5); and cf. *Sales Drivers, Local 859* v. *National Labor Relations Board*, 229 F. 2d 514 (C.A. D.C.), certiorari denied, 351 U.S. 972, with *Truck Drivers, Local 728* v. *National Labor Relations Board*, 249 F. 2d 512 (C.A. D.C.), certiorari denied, 355 U.S. 958. This is what the Board did here, considering the picketing at Macatee's premises as one factor in assessing the Union's object.[6]

Nor is there substance to petitioner's contention (Pet. 13–17) that the Fifth Circuit and the Court of Appeals for the District of Columbia Circuit have been applying different principles in common situs cases. The cases cited above show that both circuits, as well as others, have sustained findings that a secondary object was present on the basis of factors comparable to those which form the basis for decision

[6] See particularly Pet. App. 16, note 16, where the Board made clear that it did not adopt the Trial Examiner's conclusion that decision in this case turned upon any single factor.

here.[7] Differences in factual situations do not make for a conflict in principle.

Finally, the propriety of the Board's finding with respect to the picketing at the construction projects on and after February 1959 is not impaired by the circumstance that the earlier picketing (see *supra*, p. 4, note 3) at those projects was deemed lawful (Pet. 18). In the case of the earlier picketing the General Counsel was of the view that, not only was there no opportunity to reach Macatee's construction employees at places other than the construction sites, but there was no showing that the picketing was carried on in a manner which directed it at the neutral contractors and their employees, as was the later picketing.

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[7] Petitioner alleges (Pet. 13) a conflict between *Retail Wholesale and Department Store Union, AFL-CIO* v. *Rains*, 266 F. 2d 503 (C.A. 5), which affirmed a temporary injunction against union picketing, and *United Wholesale and Warehouse Employees, Local 261* v. *National Labor Relations Board*, 282 F. 2d 824 (C.A. D.C.), where the court refused in a later stage of the same case to enforce the Board's finding that the picketing was an unfair labor practice. No conflict can possibly exist, however, since the Fifth Circuit in *Rains*, being concerned only with whether there was reasonable cause to believe that a violation had occurred, expressly refused to consider the merits of the unfair labor practice allegations prior to the decision of the Board. 266 F. 2d at 505.

Petitioner also claims (Pet. 14, 18) that the Fifth Circuit explicitly admitted in *Superior Derrick Corp., supra*, a conflict with other circuits, and particularly with the District of Columbia Circuit decision in *Seafarers International Union* v. *National Labor Relations Board* (*Salt Dome*), 265 F. 2d 585 (C.A. D.C.). The Fifth Circuit in *Superior Derrick*, however, merely suggested "the possibility of a difference in * * * approach" from other circuits and rejected the rationale of the *Salt Dome* case, apparently because it construed

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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the latter decision too broadly. The decision in *Salt Dome* was limited to circumstances which are different from those in *Superior Derrick* and the instant case—that is, the common situs was the only place where the union could effectively picket the primary employer and there was no conduct by the union negating the primary object stated on the picket signs. This is confirmed by the cases cited in the text above, which show that, under the circumstances here, both the Fifth and the District of Columbia Circuits, as well as other circuits, have sustained a finding of secondary object. See also *Local 761, International Union of Electrical, Radio and Machine Workers* v. *National Labor Relations Board*, 278 F. 2d 282, 285 (C.A. D.C.), certiorari granted, 364 U.S. 869, explaining the limited scope of the earlier *Salt Dome* decision.

APPENDIX

JUDGMENT

Extract from the Minutes of August 18, 1960

No. 18091

NATIONAL LABOR RELATION BOARD

versus

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 745

This cause came on to be heard on the petition of the National Labor Relations Board for enforcement of an order of the National Labor Relations Board made on August 24, 1959, in proceedings known upon the records of the Board as Case No. 16–CC–91, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the order of the Board in this cause be, and the same is hereby, modified in accordance with the opinion of this Court, and as so modified, that said Order be, and it is hereby, enforced.

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